No. 9218

United States

Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LOS ANGELES BRICK & CLAY PRODUCTS CO., a corporation,
Respondent.

Supplemental Transcript of Record

On Petition for Enforcement of an Order of the National Labor Relations Board.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 88-10-20-39

No. 9218

United States

Circuit Court of Appeals

For the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LOS ANGELES BRICK & CLAY PRODUCTS CO., a corporation,
Respondent.

Supplemental Transcript of Record

On Petition for Enforcement of an Order of the National Labor Relations Board.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO 85-10-20-39

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9218

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

LOS ANGELES BRICK & CLAY PRODUCTS COMPANY,
Respondent.

On Petition for Enforcement of an Order
of the National Labor Relations Board

APPLICATION FOR AN ORDER PERMITTING RESPONDENT TO FILE AMENDMENT TO DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD TO BE PRINTED.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the respondent, Los Angeles Brick & Clay Products Company, and prays that an order be made permitting respondent to file Amended Designation of Additional Portion of the Record to be Printed, copy of which proposed Amended Designation is attached hereto and made a part hereof, and to permit the inclusion in the printed

record, as a supplement thereto, of respondent's Exceptions to the Intermediate Report, copy of which is included as Document #17 in the Certificate of the National Labor Relations Board dated June 20, 1939 on file herein.

This application is made for the reason that the undersigned counsel for respondent inadvertently failed to include said document in respondent's Designation of Additional Portions of the Record to be Printed, and for the further reason that respondent's said counsel erroneously assumed that all of the documents included in the Certificate of the National Labor Relations Board on file herein would be included in the printed record without special designation.

In the opinion of respondent's said counsel, said respondent's Exceptions to the Intermediate Report are material upon this appeal.

Respondent files herewith in further support of this application the consent of the National Labor Relations Board to the inclusion of said respondent's Exceptions to the Intermediate Report in the printed record as in this application prayed for.

Wherefore, respondent prays this Honorable Court to make an order permitting respondent to file Amended Designation of Additional Portions of the Record to be Printed, and permitting the inclusion in the printed record, as a supplement thereto, of respondent's Exceptions to the Inter-

mediate Report, and granting such other and further relief as may be proper.

HOWLETT and MacLAREN
By TOWSON T. MacLAREN
Attorneys for Respondent

[Endorsed]: Filed Sept. 26, 1939. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

RESPONDENT'S AMENDED DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD TO BE PRINTED

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the respondent, Los Angeles Brick & Clay Products Company, and prays that the following additional portions of the record be printed:

1) Respondent's Exceptions to the Intermediate Report, being Document #17 in the Certificate of the National Labor Relations Board dated June 20, 1939 and heretofore filed in this Court.

Dated at Los Angeles, California, this 21 day of September, 1939.

HOWLETT and MacLAREN
By TOWSON T. MacLAREN
Attorneys for Respondent

[Endorsed]: Filed Sept. 26, 1939. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit

Excerpt from proceedings of Monday, October 2, 1939.

Before: Garrecht and Denman, CJJ.

[Title of Cause.]

ORDER GRANTING MOTION TO FILE ADDITIONAL DESIGNATION OF RECORD TO BE PRINTED, ETC.

Upon consideration of the application of respondent for an order permitting respondents to file amended designation of additional portion of the record to be printed, and to permit the inclusion in the printed record, as a supplement thereto, of respondent's Exceptions to the Intermediate Report, and stipulation of counsel for petitioner thereto, and by direction of the Court, It Is Ordered that said application be, and hereby is granted.

United States of America

Before the National Labor Relations Board
Twenty-first Region

Case No. C-584

In The Matter of

LOS ANGELES BRICK & CLAY PRODUCTS COMPANY, a corporation,

and

ALBERHILL CLAY PRODUCTS WORKERS UNION, No. 373.

STATEMENT OF EXCEPTIONS TO THE RECORD AND TO THE INTERMEDIATE REPORT.

Los Angeles Brick & Clay Products Company, a corporation, respondent herein, presents herewith its statement of exceptions to the record and to the intermediate report filed herein.

I.

Exception to ruling on motion to dismiss proceedings for lack of jurisdiction and to jurisdictional findings.

Respondent prior to filing its answer herein filed its Notice of Special Appearance and Motion to Dismiss the complaint and all proceedings thereon, upon the grounds that said respondent had not during any time mentioned in said complaint or within two years prior thereto, and that it was not then, engaged in any operations, the interruption of which would have the effect of burdening or obstructing the free flow of commerce among the several states, territories of the United States, or with foreign countries, and upon the ground that the alleged activities of respondent as set forth in the complaint herein had not a close, intimate or substantial relation to or effect upon trade, traffic or commerce among the several states, territories of the United States, or with foreign countries, or had led or tended to lead to labor disputes, burdening or obstructing commerce, or the free flow of commerce within the meaning of the National Labor

Relations Act, and within the meaning of Article I, Section 8, and the 10th Amendment to, the Constitution of the United States.

In addition to said Motion to Dismiss for lack of jurisdiction the jurisdictional question was also put in issue by the complaint and the answer thereto filed herein by respondent.

At the commencement of the hearing before the Trial Examiner it was stipulated by and between the attorney on behalf of the National Labor Relations Board and the attorneys on behalf of respondent that the evidence concerning the question of jurisdiction would be taken last in order and the Trial Examiner reserved his ruling on the said Motion to Dismiss for want of jurisdiction until after all the jurisdictional facts had been heard. (Tr. 4)

Thereafter and prior to the introduction of evidence on the question of jurisdiction the following stipulation was offered by respondent and accepted by the Board. (Tr. 794-795)

> "Be it stipulated that all testimony and evidence introduced on behalf of Respondent upon the issue of jurisdiction as joined in the complaint and answer filed herein marked respectively Board's Exhibit 1c and 1m, be deemed and considered for all purposes as having been introduced by Respondent in support of its special Appearance and Motion to Dismiss for lack of jurisdiction heretofore filed

herein, marked Board's Exhibit 1 (1), to the same extent and with the same force and effect as if such evidence and testimony had been separately and regularly offered and introduced on behalf of respondent company in support of such Motion to Dismiss; and that all testimony and evidence introduced on behalf of the Board upon the issue of jurisdiction as joined in said complaint and answer be deemed and considered for all purpose as having been introduced in contravention of said Special Appearance and Motion to Dismiss for lack of jurisdiction, to the same extent and with the same force and effect as if such testimony and evidence had been separately and regularly offered and introduced on behalf of the Board in contravention of said Motion to Dismiss, and

Be it further stipulated that said Motion to Dismiss for lack of jurisdiction may be submitted for decision upon the proofs so adduced as hereinbefore in this stipulation referred to."

Thereafter upon the conclusion of said hearing the Trial Examiner under and in pursuance of the stipulation hereinabove referred to made his ruling upon respondent's Motion to Dismiss the complaint for lack of jurisdiction and said motion was by said Examiner denied. (Tr. 828)

Respondent excepts to the said ruling of the Trial Examiner denying respondent's Motion to Dismiss for lack of jurisdiction, and excepts to the Trial

Examiner's intermediate report, and particularly to that portion thereof wherein the Trial Examiner found:

> "The total volume of its respondent's sales for the year 1936, and from January to November, 1937, both inclusive, amounts to approximately $970,000.00. Of said sales approximately $131,000.00 in value were either by respondent or its purchasers shipped outside the State of California. For either or both intrastate and interstate shipments, respondent used thirteen (13) different truck carriers, and five (5) different railroad carriers",

and further excepts particularly to that portion of said intermediate report wherein the Trial Examiner further found as follows:

"Effect of Unfair Labor Practices Upon Commerce

> Upon the whole record the undersigned finds that the activities of respondent set forth in Section III above occurring in connection with operation of respondent set forth in Section I above have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and have led and tended to lead to labor disputes burdening commerce and the free flow of commerce."

and further excepts particularly to that portion of said intermediate report wherein the Trial Examiner concludes in paragraph 1 of his conclusions that by the acts therein set forth, and as set forth in the Findings of Fact, respondent

> "has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8, Subdivision (1), and Section 2, Subdivisions (6 & 7) of the National Labor Relations Act."

and further excepts particularly to that portion of said intermediate report wherein the Trial Examiner concludes in paragraph 2 of his conclusions that by the acts therein set forth and as set forth in the Findings of Fact, respondent

> "has engaged in and is engaging in unfair labor practices affecting Commerce within the meaning of Section 8, Subdivision (3) and Section 2, Subdivisions (6 & 7) of the National Labor Relations Act."

and further excepts particularly to that portion of said intermediate report wherein the Trial Examiner concludes in paragraph 3 of his conclusions that

> "respondent by its refusal to bargain collectively with Alberhill Clay Products Workers Union No. 373 as set forth in the above findings of fact, has engaged in and is engaging in unfair labor practices affecting commerce within the meaning of Section 8, Subdivision (5) of the National Labor Relations Act."

Said exceptions and each of them are taken and made upon the grounds and for the reasons that there is not sufficient or substantial, or any evidence

to support the said findings and conclusions, or any of them, and that the Trial Examiner in denying respondent's Motion to Dismiss for lack of jurisdiction erred to the prejudice and substantial injury of the rights of respondent.

Jurisdictional Findings Not Supported By Evidence

The findings that of the total volume of respondent's sales for the year 1936 and from January to November, 1937, both inclusive, approximately $131,000.00 in value were either by respondent or its purchasers shipped outside the State of California, is not supported by the evidence.

The evidence shows without conflict that respondent's total sales for the year 1936 were $501,-379.62, and that respondent's total sales for the year 1937 from January to November, inclusive, were $468,857.64, the aggregate total for the year 1936 and the year 1937 from January to November inclusive, being $970,237.26. (Respondent's Exhibit #5)

However, with reference to sales made outside the State of California, the evidence shows conclusively that the value of sales of all products DELIVERED BY RESPONDENT TO DESTINATIONS OUTSIDE THE STATE OF CALIFORNIA in the year 1936 aggregated only $26,927.16. (Respondent's Exhibit #6). In other words in the year 1936 of the total sales by respondent of its products of $501,379.62 only $26,927.16 or

5.37% represented sales of products of respondent delivered by respondent to destinations outside the State of California.

The evidence further conclusively shows that in the year 1937 from January to November, inclusive, the value of sales of all products of respondent delivered by respondent to destinations outside the State of California aggregated only $32,149.96. (Respondent's Exhibit #7). In other words in the year 1937 from January to November, inclusive, of the total sales by respondent of its products of $468,857.64 only $32,149.96 or 6.85% represented sales of products of respondent delivered by respondent to destinations outside the State of California.

The evidence therefore further shows conclusively that of the total value of all sales of respondent in both 1936, and 1937 from January to November, inclusive, of $970,237.26 ONLY $59,077.12 OR 6.08% REPRESENTED SALES OF RESPONDENT'S PRODUCTS DELIVERED BY RESPONDENT TO DESTINATIONS OUTSIDE THE STATE OF CALIFORNIA.

The uncontradicted evidence further shows THAT ALL OF THE SALES OF RESPONDENT'S PRODUCTS FOR THE YEAR 1936, AND YEAR 1937 FROM JANUARY TO NOVEMBER INCLUSIVE, (respondent's Exhibit #5), except the sales shown in respondent's exhibits 6 and 7 admittedly made and delivered to purchasers outside the State of California, WERE SALES OF

PRODUCTS MADE AND DELIVERED BY RESPONDENT TO DESTINATIONS WITHIN THE STATE OF CALIFORNIA. (Tr. 807-808)

In other words, of respondent's total sales for the year 1936, and the year 1937 from January to November, inclusive, 93.92% were sales of products made and delivered by respondent to destinations within the State of California, and there is no evidence whatsoever of any character in the record showing that any of said products ever left the confines of the State of California, or in any manner moved in, burdened, or in anywise affected to the slightest degree interstate commerce.

The finding of the Trial Examiner that of the total sales for the year 1936, and the year 1937 from January to November inclusive, "approximately $131,000.00 in value, were either by the respondent or its purchasers shipped outside the State of California" is wholly unsupported by the uncontradicted evidence in the record. The only explanation for the use by the Examiner of the figure of $131,000.00 in his findings is that he has erroneously added to the sales admitted by respondent to have been made and delivered by it to destinations outside the State of California, the sales shown in Board's Exhibits 11 and 12, totaling $72,258.27. However, as said Board's Exhibits 11 and 12 expressly state the figures therein set forth only purport to represent the value of products SOLD AND DELIVERED BY RESPONDENT IN THE STATE OF CALIFORNIA, THE INTENTION

OF THE PURCHASER TO SHIP OUT OF THE STATE BEING INDICATED BUT THE ACTUAL DESTINATION OF THE PRODUCTS BEING UNKNOWN.

As will be hereinafter pointed out, in determining whether or to what extent a person is engaging in interstate commerce as distinguished from engaging in purely intrastate commerce, it must be shown that the products in question actually moved in interstate commerce; in other words that the products actually cross the territorial boundary and move out of the state.

The products referred to in Board's Exhibits 11 and 12 are products which were both SOLD and DELIVERED by respondent within THE STATE OF CALIFORNIA. Further they are products, THE ACTUAL DESTINATION OF WHICH, if not at the point to which delivered, IS UNKNOWN, AND NOT SHOWN TO BE OTHERWISE THAN THE SAID POINT AT WHICH THE PRODUCTS WERE DELIVERED. However, for the sole reason that at the time of the purchase of the products referred to in Board's Exhibits 11 and 12 AN INTENTION OF THE PURCHASER TO SHIP THE PRODUCTS OUT OF THE STATE OF CALIFORNIA WAS MERELY INDICATED, the Trial Examiner by his said finding has given such products the status of goods moving in interstate commerce, by adding the total of such sales to the sales admitted by respondent (respondent's Exhibits 6 and 7), to have been

actually sold and delivered by it outside the State of California.

Since the actual destination of these products is unknown it cannot be presumed that they left the State of California, and especially can this presumption not be indulged in where the uncontradicted evidence shows that the products were both sold and delivered within the State of California. To indulge in such a presumption is merely to speculate, and the question as to whether or not respondent is subject or amenable to the provisions of the National Labor Relations Act cannot be determined through conjecture or speculation, and the finding in question is erroneous.

The law is clear that in measuring the extent to which respondent is engaged in interstate commerce, the sales of its products covered by Board's Exhibits 11 and 12 must be excluded. Such sales must be so excluded for the reason that the actual movement of the products referred to was not established to be interstate nor in fact was the actual movement thereof, beyond or from the point of delivery within the State, shown at all. That the actual movement of the products in question MUST BE SHOWN to be interstate has been established by the United States Supreme Court in the case of Santa Cruz Fruit Packing Company vs. National Labor Relations Board, (U. S.) decided March 28, 1938. The Court said:

> "First.—There is no question that petitioner was directly and largely engaged in interstate

and foreign commerce. We have often decided that sales to purchasers in another State are not withdrawn from federal control because the goods are delivered f. o. b. at stated points within the State of origin for transportation. See Savage v. Jones, 225 U. S. 501, 520; Texas & N. OR. R. Co. v. Sabine Tram Co., 227 U. S. 111, 114, 122; Pennsylvania R. R. Co. v. Clark Coal Mining Co., 238 U. S. 456, 465-468. A large part of the interstate commerce of the country is conducted upon that basis and the arrangements that are made between seller and purchaser with respect to the place of taking title to the commodity, or as to the payment of freight, *where the actual movement is interstate,* does not affect either the power of Congress or the jurisdiction of the agencies which Congress has established. Pennsylvania R. R. Co. v. Clark Coal Mining Co., supra." (Italics ours.)

The Court in said case further states: "and the place where the manufacturer makes his sales is not controlling *if the sales in fact are in interstate commerce.*" (Italics ours.)

Having therefore shown the measure of participation of respondent in interstate commerce to be an amount not to exceed 6.08% of its total sales of products for the two-year period covered, the question then presents itself as to what bearing this fact in and of itself has in determining whether the re-

spondent is engaging in interstate commerce within the meaning of the National Labor Relations Act and the applicable provisions of the Constitution of the United States.

At the outset we submit to the most recent decision of the United States Supreme Court on that subject (Santa Cruz Fruit Packing Co. vs. National Labor Relations Board, supra), and for the purpose of argument concede that this question cannot be answered by a mere reference to percentages.

It is fully to be realized that the test is one entirely of degree, that is, the determination of the extent to which, in light of a composite picture of the respondent's operations, including the acquisition of raw materials and the manufacture and sale thereof, the alleged unfair labor practices herein involved had "such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes" (Santa Cruz etc. vs. N. L. R. B., supra), or the extent to which said unfair labor practices burdened or obstructed interstate commerce or the free flow of interstate commerce, or led or tended to lead to a labor dispute burdening or obstructing interstate commerce or the free flow of interstate commerce.

In the light of the foregoing rules, we respectfully submit that the jurisdictional findings hereinbefore specially excepted to are and each of them is

wholly unsupported by the evidence which further shows as follows:

(1) That the principal raw material used by respondent in the manufacture of its products is clay, produced by it at its Alberhill, California, plant. Also used in said manufacture are certain chemicals purchased by respondent from local concerns in the State of California. (Tr. 806-807)

(2) That none of the raw materials used by respondent in the manufacture of its products come from without the State of California. (Tr. 805, 807)

(3) That respondent did not ship any raw materials from California to points outside the State of California during the years 1936-1937. (Tr. 805)

(4) That respondent has never registered a trade-mark with the United States Patent Office. (Tr. 805)

(5) That respondent has never registered with the Federal Securities and Exchange Commission. (Tr. 805)

(6) That respondent has never registered under the Federal Motor Carriers Act of 1935. (Tr. 805)

(7) That as to all sales made by respondent in which delivery is made within the State of California, the company thereafter has no control over the destination of the goods or any responsibility for loss or damage thereof. (Tr. 808)

(8) That respondent is not required by the Board of Equalization of the State of California to pay a sales tax on sales listed in Respondent's Exhibits 6 and 7. (Tr. 808)

(9) That respondent is required by the State Board of Equalization of California to pay sales taxes upon the products sold and delivered in the State of California, as set forth in Board's Exhibits 11 and 12. (Tr. 808)

(10) That respondent has no regularly appointed sales agency outside the State of California. (Tr. 820)

(11) That respondent has no regularly appointed dealers outside the State of California. (Tr. 820)

(12) That respondent has no established distribution points outside the State of California. (Tr. 820)

(13) That respondent does not do any national advertising. (Tr. 820)

(14) That respondent does not have any traveling salesmen who cover territories outside the State of California. (Tr. 820)

(15) That respondent neither owns nor operates trucks that deliver products outside the State of California. (Tr. 820)

(16) That respondent's production of clay products of all kinds, in relation to or compared with the total production of clay products manufactured by the various clay products manufacturers in the United States, including

those within the State of California, is INFINITESIMAL. (Tr. 809, Respondent's Exhibit 8; Tr. 812, Respondent's Exhibit 10.)

(17) THAT AT NO TIME PRIOR TO, DURING OR AFTER THE STRIKE AT RESPONDENT'S PLANT WAS RESPONDENT PREVENTED FROM MAKING ANY SHIPMENTS, EITHER INTRA OR INTERSTATE, BY REASON OF THE LABOR DIFFICULTIES OR THE STRIKE. (Tr. 820)

The evidence further shows without conflict that respondent's business does not consist of a continuous flow of raw materials coming into the State from without, its manufacture by respondent and the resumption of the flow of manufactured products from respondent's plant to points without the State. The familiar test, therefore, referred to by the metaphor "stream of commerce", has no application here.

The record further shows respondent to be a small clay products manufacturer, employing at the most only 166 men at its plant and only five (Tr. 825) salesmen operating entirely within the State of California, and in fact within a radius of not to exceed 125 miles from its plant at Alberhill, (Tr. 823), and doing a total sales business for the years 1936 and 1937 of an average of approximately $485,000.00 per year; and economically prevented because of the relatively heavy weight of its prod-

ucts, because of freight rates, and because of the location of competitive companies, from shipping its products for any great distance from the place of manufacture at Alberhill, California. (Tr. 819, 824-825)

In relation to the picture thus presented by the evidence of respondent's business and operations, the actual participation of respondent in interstate commerce shown by the percentage (6.08%) of its products sold and delivered out of the state, is reduced to a degree of participation which is obviously inconsequential, whether contrasted with or compared to the total of all interstate commerce carried on by all persons between all the United States and foreign countries, or whether contrasted or compared with the total only of interstate commerce carried on by all clay products manufacturers in the United States, or by any other standard.

We submit therefore that it cannot be said that the alleged unfair labor practices or the labor dispute occurring at respondent's plant had either a close or a substantial relation to the freedom of interstate commerce from injurious restraint nor that said alleged practices in any manner, substantial or otherwise, burdened or obstructed interstate commerce or the free flow of interstate commerce, or that said alleged practices led or tended to lead to a labor dispute either burdening or obstructing interstate commerce or the free flow of interstate commerce. Especially must this be the conclusion drawn in the light of the undisputed evidence that,

as heretofore pointed out, at no time prior to, during or after the strike at respondent's plant was respondent prevented from making any shipments, either intra or interstate, by reason of the labor difficulties or the said strike, and further inquiry into the purely speculative realm of whether said practices or said strike might as a matter of law HAVE TENDED so to obstruct or interfere with interstate commerce is therefore foreclosed.

As further said in the Santa Cruz case, Supra:

> "Third.—It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, *it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection.* However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce', and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. Schechter Corporation v. United States, 295 U. S. 495, 546. 'Activities local in their immediacy do not become interstate and national because of distant repercussions'." (Italics ours.)

In all deference to the Court's admonition in the Santa Cruz case not to attempt to overcome what is

reasonably clear in a particular application by the simple and familiar dialectic of suggesting doubtful and extreme cases, we earnestly submit, in conclusion, that in the event this Board determines that it is entitled to assert jurisdiction over respondent in the enforcement of the National Labor Relations Act, it will be asserting a principle that federal jurisdiction within the meaning of the United States Constitution attaches to each and every person engaged in business within a State and whose participation in the sum total of interstate commerce within the United States or with foreign countries is but minute, petty and trifling; and adopting the converse of the language used by the Court in the Santa Cruz case, we submit that it would be difficult to find a case in which unfair labor practices, assuming they were committed, had a MORE INDIRECT or LESS EFFECT upon interstate and foreign commerce, than the case at bar.

II.

EXCEPTIONS TO PARAGRAPH 3 OF INTERMEDIATE REPORT RE UNFAIR LABOR PRACTICES.

A. Organizational Efforts of the Union.

Respondent concedes that the findings herein made are substantially in accord with the evidence with the following exceptions hereinafter noted:

(1) The evidence shows that the handbill advance notices of the June 1 meeting of the union were not only freely distributed among

respondent's EMPLOYEES as found by the Examiner, but were also freely distributed in and about the offices of respondent, both at the Alberhill plant and at the office of respondent in Los Angeles, where not only the employees of respondent were employed, but where also the various foremen and other supervisory employees might and did in fact see them. (Tr. 349 & 689)

(2) The evidence shows that four of respondent's foremen attended the said June 1 meeting as found by the Trial Examiner, but the additional finding that they or any of them "observed" is ambiguous, and in that state the finding is, to say the least, incomplete. If the finding that they "observed" is intended to convey merely the idea that while at the meeting they were in possession of their visual faculties only, the finding of course is harmless, but if by the finding it is intended to convey the thought that the foremen attended the meeting as part of a plan to spy upon or to make mental or actual notes of the union activities of the men, the finding then becomes important, and in that sense is excepted to by respondent.

The evidence does not show that they attended the meeting with any such ulterior motive, but as the evidence does show, and as the foremen all testified, they attended the meeting entirely from motives of curiosity. (Tr. 710). The notices of the

meeting themselves did not restrict the attendance to any particular class of respondent's employees, nor did the notice exclude from the open meeting the foremen or other supervisory employees of respondent. (Tr. 472). Furthermore, the evidence shows that the meeting was noticed to be held at the local American Legion Hall in the small town of Elsinore, of which organization some of the foremen who attended, were members. Furthermore, the evidence affirmatively shows that none of the attending foremen had been instructed to, nor had it been suggested to them that they, attend the meeting, either by Mr. Larson, the general superintendent of respondent, or by Mr. Bodine, the plant superintendent. (Tr. 499). The evidence also shows affirmatively that none of the foremen were asked to leave the meeting, nor was any objection voiced to their attending and remaining. Also strongly indicative of the intention of the foremen in attending is the fact that when the speaker of the evening finished his introductory remarks and requested prospective members to come forward and make application for membership in the union, the foremen voluntarily began to leave, three almost immediately, and the fourth very shortly thereafter. (Tr. 551) Had they attended the meeting for the purpose of spying upon the men, in the normal pursuit of such a plan, they would have most certainly remained in order to make mental or actual note of the particular employees who might make application to join the union. The evidence shows

conclusively that they obviously were not interested in making such observations, but on the contrary left the men free to join the union if they wished, and in such numbers as they wished, in complete privacy. (Tr. 473, 500)

We therefore submit that if the finding hereinabove noted that the foremen "observed" while at the meeting is intended to convey the meaning hereinabove suggested, the finding constitutes a gross distortion of the evidence, and is totally unsupported thereby.

B. The Refusal to Bargain Collectively.

(1) Respondent excepts particularly to the finding appearing under the foregoing heading at page 5 of the intermediate report that

> "The above-mentioned requests and notice of intention to strike should respondent fail to comply therewith, were incorporated in a written document, which documnet was delivered to respondent on the morning of June 10, 1937."

for the reason that the evidence fails to show that any notice of intention to strike was ever given by the union or any of its representatives to respondent either orally or in writing. The only document delivered to respondent on the morning of June 10th of which there is any record in the evidence is Board's Exhibit No. 2 which reads as follows:

> "1. The Los Angeles Brick and Clay Products Company recognize and accept as the collective bargaining agent of its employees the

recently formed Union known as the Alberhill Clay Workers Union, affiliated with the International Mine, Mill and Smelter workers.

2. That all employees whose services were terminated since the first day of June? Nineteen hundred, Thirty-seven reasons of the reported depression in business and shortage of orders on hand to be filled, be reemployed and put to work at the Alberhill plant of the Los Angeles Brick and Clay Products Company before seventy thirty A. M. Friday, the eleventh day of June *nineteen and* thirty seven, and in the existence of said depression of business and lack of orders on hand that the men shall be given equal number of hours of work each month until said depression is over; thus relieving any man or group of men from standing *from standing* the full brunt of said depression and that all overtime consisting of time over 8 hours in any one day and 40 hours in any week be paid at the rate of one and one-half time. This article to be in effect until July 15, 1937.

The representatives and (or) the president of the Alberhill Clay Workers Union be notified of the decision of acceptance or refusal reached by the Los Angeles Brick and Clay Products Company by twelve o'clock midnight of Thursday the tenth day of June Nineteen Hundred and Thirty-seven and in the existence of no notification by the specified hour the Union shall act upon the supposition that their

requests have been denied and will not be complied with.

EDWARD E. HANNUM
President
LAURENCE C. McNUTT
Sec. & Treas."

There is no reference in said document to any intention on the part of the union or its members to strike, and it is submitted that by no rules or interpretation or construction could such a meaning be ascribed to its contents. Furthermore, there is no evidence in the record that any oral notice of intention to strike was given to respondent either at the time of the presentation of said Exhibit No. 2 to respondent on the morning of June 10th, or at any time theretofore or thereafter. The evidence further shows that Mr. Bodine, to whom Exhibit No. 2 was originally presented, did not consider said Exhibit No. 2 as containing any notice of intention to strike, should the dead line therein referred to pass without compliance by respondent with the demands therein contained. (Tr. 498) Furthermore, there is no evidence whatsoever in the record that respondent, its foremen, or other supervisory employees had any knowledge of any character whatsoever that a strike would be called, until the picket line was formed about respondent's plant at or about 7:30 A. M. June 11th, exactly twenty-four hours after the receipt by respondent of said Board's exhibit No. 2.

(2) Respondent further particularly excepts to the finding contained on pages 5 and 6 of said intermediate report, wherein it is found that:

> "the respondent failed to reply to the said requests of the union, and the members thereof went out on strike and established a picket line at the respondent's said plant."

for the reason that said finding is unsupported by the evidence, the uncontradicted evidence in the record being that the respondent did reply to said requests of the union.

Mr. Bodin, plant superintendent of respondent, testified concerning his conversation on the afternoon of June 10th with Mr. Lucas, the representative of the union who presented Exhibit No. 2 to Mr. Bodine earlier that day, as follows:

> Q. Now, Mr. Lucas testified that late in the day of June 10 that he had a conversation with you respecting the presentation of this petition, and concerning unions. Do you recall such a conversation? A. I do.
>
> Q. And what did you say to Mr. Lucas at that time?
>
> A. I went out to the machine shop where Mr. Lucas was working, and told him that I had taken this matter up with Mr. Larson; that Mr. Larson stated that he couldn't do anything until he had either consulted with the board of directors or called a directors' meeting, one of the two. I don't recall just how he stated it,

but it was in reference to taking this matter up with the board of directors. (Tr. 490-491)

(3) Respondent further particularly excepts to the finding appearing on pages 6 and 7 of said intermediate report, wherein it is found that

> "The respondent has at all times since June 10, 1937 refused to bargain collectively with Alberhill Clay Products Workers Union No. 373 as exclusive representative of respondent's said pit and production employees in respect to rates of pay, wages, hours of employment, and other conditions of employment."

for the reason that said finding is unsupported by the evidence.

The evidence shows without conflict that at no time from the date of formation of the union until the evidence in the form of Board's Exhibit No. 5 was introduced at the hearing in this matter on December 16, 1937, did respondent have any information, assurance or evidence from any source that a majority of respondent's employees either on June 9 or 10, or at any time thereafter, had designated the union as their representative for the purpose of collective bargaining with respondent, nor with the possible exception of the information afforded by Board's Exhibit No. 4, did respondent have any information as to which of its employees belonged to the union. (Tr. 501)

Reference to Board's Exhibit No. 2 shows that it does not even purport to state that the union repre-

sented a majority of respondent's employees, nor did it purport to state that the union represented or was composed of any of the employees of respondent other than possibly the men who signed the notice, to-wit, Edward E. Hannum and Laurence C. McNutt. Furthermore, there is no evidence that at the time of the presentation of Board's Exhibit No. 2 to respondent, or thereafter, any oral representation, statements or assurances of any character were made by the union or its representatives to respondent that the union represented a majority of respondent's employees.

The only other attempt by the union to collectively bargain with respondent, if it may be called such, was by letter from the union to respondent dated June 15, 1937 and received by respondent June 16, 1937 (Board's Exhibit No. 3). Reference to this exhibit likewise shows that it did not purport to state that the union represented a majority of respondent's employees. Subsequent to sending the Board's Exhibit No. 3 the evidence shows that no further attempts were made by the union to bargain collectively or otherwise with respondent.

With respect to the alleged failure of respondent to reply further to the unreasonable demands contained in Board's Exhibit No. 2, other than the reply hereinabove noted to have been given by Mr. Bodine to Mr. Lucas who presented it, and with respect to the alleged failure of respondent to reply to Board's Exhibit No. 3, attention must be called to the Trial Examiner's finding appearing on

page 6 of said intermediate report, wherein it is found that subsequently to June 14, 1937

> "and while the strike was still on representatives of the respondent met in the office of the Regional Director of the Board at Los Angeles, California, in an attempt to settle their differences, but they were unable to do so."

Although the record contains conflicting and contradictory statements by some of the persons who attended that meeting the following testimony of Gustav Larson, general superintendent of respondent company, concerning that conference was not contradicted nor denied by any other person present at the meeting:

> Q. Did you attend a conference called by Dr. Nylander on June 15th?
>
> A. On June 15 I was down with Dr. Nylander myself. (Tr. 353)
>
> (By Mr. Howlett)
>
> Q. When you went in to see Dr. Nylander, who was present at the time?
>
> A. The first meeting, Dr. Nylander and myself and Mr. Howard; that is Dr. Nylander's assistant.
>
> Q. And when was that meeting held?
>
> A. On Tuesday the 15th.
>
> Q. And when you went in what did you say to Dr. Nylander?
>
> A. First we had two appointments. My office made the appointment for 9:00 o'clock in the

morning, and Dr. Nylander called in the morning and postponed it until 3:30 in the afternoon. And I went in and told him who I was and handed him that notice. He read it—can I change it a little bit?

Q. Surely.

A. When I got in Dr. Nylander wasn't in his office and the girl there took me into Mr. Howard and I said, "Dr. Nylander had an appointment with me," and we waited for a little while, then went out in the hall to look for Dr. Nylander, and he came, and Mr. Howard, myself and Dr. Nylander went into Dr. Nylander's office. That is how Mr. Howard was in with us. He read the letter over and threw it over across the table to Mr. Howard and he says, "That is illegal. They can't do it." And I said, "Well, they are doing it." And he was quite stirred up. He said, "I am going to San Diego during the week-end and I am going to make it a point to stop off at Alberhill and see if something can't be done and talk to the men." He said, "Any damage done?" And I said, "Certainly. They walked away from the kilns with fires burning and gave us no notice. We had to close down and there will be a big loss."

Then Dr. Nylander excused himself. He said, "I have a meeting. Will you go in and take this up with Mr. Howard?" Howard had left the office a few minutes before and I went into Mr. Howard's office and he said "I just called up

the headquarters for union. They said that the Alberhill had no authority to strike. It is illegal." He said, "The hotheads don't know what to do." (Tr. 361, 362, 363)

* * * * * * *

Q. Now, referring to this conference held in Dr. Nylander's office, at the time when the representatives of the union were present, just what took place at this conference, Mr. Larson? Can you tell the Examiner? A. I can.

Q. Did you arrive there before the employees? A. I did.

Q. Did you talk with Dr. Nylander?

A. I did.

Q. And what did you discuss with Dr. Nylander?

Trial Examiner Stephenson: Pardon me. Before you answer, was anyone else present besides you and Dr. Nylander?

The Witness: No.

Trial Examiner Stephenson: All right.

The Witness: Dr. Nylander said that the employees were in from Alberhill plant. That meeting was June 23. I believe it was the 23rd or 24th. Dr. Nylander said there was a committee here from Alberhill and they wanted to be—wanted all the men put back and rotate the work. I said that is not practical and can't be done. Furthermore, our business, we can't take all the men back because on account of lack of manufacturing orders.

I explained, I told him that we had no orders to make. We had material to send out, and right then the men came in.

Q. (By Mr. Mauritsen) Then what took place?

A. He said, "Boys, I can't do anything for you. You struck. You were the leaders. You told your men something that can't be lived up to. You got no right to run their business. Mr. Larson has told us his story and I believe it is true. If I didn't believe him, I got ample means to find out whether it is so or not."

Mr. McNutt spoke up and he said, "There wouldn't be any need of laying off men if the business was run right, if he put union labor, and all the material would sell itself."

Dr. Nylander said, "Well, boys, if you know so much about it, why don't you go out and sell the material? I am sure Mr. Larson would pay you a reasonable commission."

I said, "I am willing to sell it at the regular price."

One man spoke up and I think it was—I am not certain, but I think it was Mr. Hannum, and he said, "Bull. What do we know about the business?"

Q. (By Mr. Mauritsen) What happened?

A. So McNutt said—they wanted—we had then a lot of men back, workers hired on seniority, and I asked Mr. McNutt, "How long have you been working for the company?"

He said, "Five months."

I said, "What chance have you got to get back in seniority, *when only* need at most 150 men?"

Q. Then what?

A. And that ended the whole thing. He said, "Well, boys—" no, he didn't. Dr. Nylander said, "Boys, I can't do anything for you, but when they re-hire and start up the plant, I will see that seniority prevails", and that ended the meeting. (Tr. 438, 439, 440)

* * * * * * *

Q. (By Mr. Howlett) Did you have an occasion, or did you know the provisions of the Wagner Act at the time you went to see Dr. Nylander?

A. Didn't know anything about it.

Q. What did you go there for?

A. For advice, what to do.

Q. In regard to the difficulties that you were having at the Alberhill plant?

A. In regard to that demand, the difficulty.

Q. And did you get advice from him other than what you have stated?

A. No. (Tr. 447)

As pointed out above none of the foregoing testimony was denied or contradicted by any of the persons present at the conference, including Dr. Nylander who was not called as a witness and who did not testify.

Respondent submits that there was no REFUSAL on the part of respondent to bargain with the union, and the Nylander conference in and of itself, demonstrates that respondent did not refuse to bargain with the union. With respect to respondent's failure to bargain thereafter, we submit that Dr. Nylander's uncontradicted statements as testified to by Mr. Larson furnish sufficient excuse if any be required. Is respondent to be penalized for its failure in that regard after its general superintendent, Mr. Larson, had been told by the Regional Director of this Honorable Board that the strike was illegal and unauthorized, and can a finding that respondent refused to bargain collectively with the union in violation of the Act be supported in the face of such evidence?

C. The Lay-offs.

(1) Respondent further excepts to the finding appearing on page 7 of said intermediate report, wherein after finding that the strike terminated on June 25, 1937, it was found as follows:

> "and the evening before the union addressed a letter to the respondent requesting that certain employees including those hereinafter named be reemployed in order of their seniority"

for the reason that said finding is incomplete and misleading and not supported by the evidence. Board's Exhibit No. 4, which is the only letter sent by the union to the respondent at or about that date, and which we therefore must assume is the

letter to which the Trial Examiner refers in his findings, reads as follows:

"Alberhill Clay Workers' Union
Alberhill, California

June 24, 1937.

Los Angeles Brick Co.
Alberhill, Calif.

Gentlemen:

The accompanying list of men hereby place application for re-employment at such a time as you find business warrants re-opening the Alberhill Plant. Listed men to be taken back in order of seniority.

Yours truly,

.....

Secretary & Treasurer."

The letter obviously shows that the union recognized that the same business depression which had caused the respondent to lay off forty-three (43) men between June 2nd and June 10th was still being felt, and that the extent to which respondent's plant would be reopened, if, as and when the respondent found that business conditions warranted reopening, would depend upon the same business conditions. This conclusion is inescapable in light of the request that the men listed be taken back on order of seniority.

In other words, the letter did not constitute an unqualified demand by the union for reinstatement

or reemployment of all of its members, but only that as business conditions warranted, the determination being left entirely to respondent, its members be rehired in order of seniority. The evidence shows that this is exactly what respondent did, and the mere fact that respondent, because of the continued business depression and lack of orders, was unable to reemploy all of the members of the union whose names appeared on Board's Exhibit No. 4 is no evidence of discrimination on the part of respondent as to the complainant members of the union.

(2) Respondent excepts to the finding appearing on page 7 of said intermediate report, wherein it is found that

> "all of the employees hereinafter named were either known to the respondent to be engaged in organizing the union or were observed in the picket line by the executive and supervisory employees of respondent"

for the reason that said finding is wholly unsupported by any substantial evidence, as hereinafter noted, and

(3) Respondent excepts to the findings commencing on page 7, to and including page 13, of said intermediate report, wherein it is found that Laurence McNutt, Edward Hannum, Lester Hazelton, Henry Boontjer, Thomas A. Roddy, William G. Ashworth, Lawrence H. German, Arnold Moss, James Grier, and Gerald Wenker were and each of

them was selected for layoff by respondent on the dates of their respective layoffs, as therein set forth, for the reason that said named persons joined and assisted a labor organization known as Alberhill Clay Products Workers Union No. 373 and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

With respect to none of said named persons is there any evidence in the record showing that respondent or any of its foremen or other supervisory employees had any knowledge on the respective dates of layoffs of said persons that they or any of them were then members of the union, or that they or any of them had joined or assisted the union or had engaged in concerted or any activities for the purpose of collective bargaining or other mutual aid or protection.

As an example which may be applied to all of said men, there is no evidence in the record showing that at the date of Mr. McNutt's layoff on June 3, 1937, either his foreman or any other supervisory employee of respondent had knowledge of any union activities on his part, or that he had joined the union or even made application to join. The evidence does show that Mr. McNutt attended the June 1 meeting at which the foremen were present, but there is no evidence that Mr. McNutt took any part in the meeting during the time the foremen were there.

Mr. McNutt testified as follows concerning the June 1 meeting:

Q. They were at the meeting of June 1st?

A. Correct.

Q. You stated that Mr. Bodine, Mr. Gantz, Mr. Baer, and the Pit Foreman—what is his name? A. Mills.

Q. —and Mr. Mills were present.

A. Yes.

Q. Where was that meeting held?

A. In the American Legion Hall at Elsinore.

Q. At Elsinore? A. Yes, sir.

Q. Did you have notice of that prior to the meeting?

A. The organizer had put out notices.

Q. Did you talk with any of these men at the time of that meeting?

A. No, sir. Not until after the meeting.

Q. You did talk with them after the meeting?

A. We discussed the things there after the meeting, of course.

Q. Did they participate in the discussion?

A. Who do you mean by they?

Q. I mean these men I have just named?

A. I don't know what they had to say at the meeting. I did not talk with them.

Q. Did they participate during the meeting?

A. No, sir.

Q. They had nothing to say during the meeting? A. No, sir.

Q. You knew they were there? A. Yes.

Q. Did you invite them to come in?

A. I had nothing to do with the meeting.

Q. Who did call that meeting?

A. Mr. Greene.

Q. Mr. Greene? A. Yes.

Q. That meeting was perfectly friendly, was it? A. Yes.

Q. No statements were made by any of these parties during the course of the meeting?

A. Not to my knowledge.

The next meeting of the union was not until June 5, two days after Mr. McNutt had been laid off. It was at that meeting, not the June 1 meeting, that Mr. McNutt was elected Secretary-Treasurer.

The record shows that Mr. Greene, the organizer from Los Angeles, was the only one who talked at the meeting during the time the foremen were present, except for a few questions that were asked from the floor, the questioners, however, being unidentified. (P. 6,474)

The only support, therefore, for the finding in question that at the time Mr. McNutt was laid off, his union activities were known to the supervisory employees of respondent is LESS than an inference and only a SUSPICION. In other words, it is state-

ment of a suspicion that since he attended the June 1 meeting, even only as a spectator, and since the foremen were present at the meeting, his layoff two days later must therefore have been because of his presence at the meeting; and the same reasoning is indulged in the findings as to the layoffs of all of the men referred to.

The Examiner draws this conclusion despite the silence of the record as to whether the men in question, other than McNutt, were seen at the meeting by any of the foremen, and despite the uncontradicted evidence introduced by respondent that the layoffs commencing on June 2nd were the culmination of a plan adopted by the company for a long time prior thereto, to cut down operating personnel because of declining business. (P. 502)

Furthermore, the evidence shows with respect to Henry Boontjer, Arnold Moss, and James Grier, that none of them even attended the June 1 meeting (P. 145, 310, 316), and therefore since the record shows no other evidence of any nature whatsoever that respondent or its foremen knew or had reason to know that either said Boontjer, Moss, or Grier, at the time of their layoffs had any connection with the union, the finding that they were selected for layoff by respondent because of union activities as aforesaid is wholly unsupported by the evidence.

It is proper here to note that the Trial Examiner has failed to make any express finding concerning the condition of respondent's business prior to and up to the date of the first layoffs, but by his failure

to refer thereto he has impliedly found that none of the evidence introduced by respondent showing the decline of respondent's business as the reason for the layoffs is entitled to any credence.

With respect to the layoffs in general, Mr. Bodine, the plant superintendent, testified that he was told by Mr. Larson to keep the oldest men from one standpoint, and their value to the company for the other. (Tr. 477)

He further testified that Mr. Larson discussed the necessity of having to cut down on personnel as early as the first part of May, 1937 (Tr. 502), and that further, as far as he was concerned, there was no connection between the union meeting on June 1 and the layoffs commencing shortly thereafter (Tr. 512), and that in carrying out instructions from Mr. Larson he conferred with Baer and Gantz as to whom they would suggest be laid off, the only point being to keep the greatest efficiency in the organization. (Tr. 626)

The evidence shows that for some time prior to the layoffs, respondent's business had been falling off substantially (Respondent's Exhibit No. 11), (Tr. 696, 816, 817, 818, 820 and 821); it also shows without contradiction that as testified to by Mr. Bodine and by Mr. Larson, the respondent had about April 1, 1937, completed the construction of its new tunnel kiln (Tr. 662), having a capacity of 12,000 fire brick per twenty-four hour period, and which had been in the course of construction for several months theretofore, and in the construction

of which had been used on the average of twenty men (Tr. 662), and that upon the completion thereof the men used in constructing it were not only released for other production work, but the tunnel kiln itself being then operated continually until June 11, the date of the strike, greatly increased production of respondent's products (Tr. 655), and the testimony further shows that not only was respondent's stock of standard clay products up to normal on June 1, 1937 (Tr. 654), but had respondent continued to keep its other facilities in addition to the new tunnel kiln in operation to the same extent as before, the effect would have been an overstocking of inventory (Tr. 656). The respondent's judgment in this matter of cutting down operations and personnel was vindicated by the actual orders for products received by respondent, and the sharp decline in amount thereof in May and June, 1937, (Respondent's Exhibit No. 11).

Respondent further submits that the granting by respondent of a general wage increase of 2½¢ an hour to all of its employees, effective June 1, 1937, was not inconsistent with the plan previously decided upon of curtailing operations and reducing operating personnel at or about the same time, nor is it inconsistent with the business condition and decline in orders which prompted this latter action. As testified to by Mr. Larson (Tr. 432, 433), although prior to the N.R.A. it had been the practice of respondent to lower wages during bad times, and to raise wages during good times, since the N.R.A.

the policy of respondent has been to pay the highest wage of any of the clay products companies in the territory, and if the other clay products companies raise wages it has been the policy of respondent to do likewise, even if respondent's business at the time is slack.

Concerning the granting of said general pay increase we quote the following testimony:

Q. Was a general pay increase granted the employees on the first of June?

A. No. It was granted in the middle of April.

Q. But it was to become effective the first of June?

A. For me to use my judgment.

Q. And in your judgment conditions warranted the grant on June 1?

A. I wanted to be sure first, to find out whether the other clay products companies had —they had both raised the wages, and I found out how they had done it, so as soon as I found out, I raised the minimum, the same as they did, and all the way up the line. That is the reason—I couldn't find out by May 1, and it took to June 1.

Q. Oh, I see. The Board of Directors then authorized you to make a study and then, when the conditions warranted it, to make the increase when you thought it best? A. Yes.

Q. Was the meeting of the board of directors held in April that authorized that increase?

A. It was.

Q. And in your opinion June 1 was the proper time for the increase to go into effect?

A. I found out from the other clay products how much they had raised, and as soon as I found it, I done it. I increased it June 1. I found out the middle of June, or maybe the first part of June.

Q. You said "June". Is that—do you mean May? A. May. (Tr. 429, 430)

A further analysis of the evidence will demonstrate the complete lack of discrimination because of union activities in the layoffs of respondent during the period in question, to-wit: from June 2 to and including June 10, 1937.

The uncontradicted evidence shows as follows:

(1) That the total number of men employed by respondent as of June 1, 1937, was 164. (Respondent's Exhibit No. 8)

(2) That of that number, 118 employees or 72% between June 1 and June 14, 1937, became members of the union (Respondent's Exhibit 1) and 68 employees or 28% remained non-union.

(3) That the total number of men laid off between June 2 and June 10, 1937, was 43. (Respondent's Exhibit 1)

(4) That of this total number of men laid off it was later determined that 35 or 81.2% were union men, and 8 or 18.8% were non-union men. (Respondent's Exhibit 1)

The similarity in percentages is strikingly apparent and demonstrates the uniformity of layoffs

compared to the total number of men employed and the total layoff. In analyzing these figures it must be borne in mind, as hereinbefore stated, that at the time of the layoffs respondent actually had no knowledge as to which of its men were union members and as to which of its men were not. It is submitted that the foregoing figures demonstrate that in fact there was no discrimination in layoffs as between union and non-union men.

It is interesting at this point to note with reference to one of the men found to have been discriminatorily laid off, to-wit: Arnold Moss, that although it was found by the Trial Examiner that he joined the union on June 2 and the transcript at page 310 shows he so testified, the witness saying that he joined "at Ed Hannum's house", his application card, being part of Board's Exhibit B5, bears June 5 as the date of his application for membership in the union. Furthermore, he testified that the first union meeting he attended was the meeting of June 5. These facts are significant because, as the evidence shows (Respondent's Exhibit 1), Arnold Moss was laid off on June 3. His layoff, therefore, was two days before he formally applied for membership in the union and the very next day after he says he joined the union at Ed Hannum's house. In light of this state of the record, respondent submits that a finding that Arnold Moss was laid off because of union activities is wholly unsupported, there being no evidence of any character that respondent or its foremen or other supervisory employees had any

knowledge or even any means of knowing that he had "joined" the union at the time of his layoff. In fact, it is quite apparent from the record that he did not in fact join the union until June 5, when he signed his application card under that date, his statement that he joined at Ed Hannum's house to the contrary notwithstanding.

(4) Respondent excepts to the findings commencing on page 7, to and including page 13, of said intermediate report, wherein it is found that Laurence McNutt, Edward E. Hannum, Sylvester Osborne, Lester Hazelton, Henry Boontjer, Thomas A. Roddy, William C. Ashworth, Lawrence German, Lucas, Arnold Moss, James Grier, Frank German, Art Hannum, Gerald Wenker, and Glenn Stewart have since June 25, 1937, been refused employment by respondent for the reason that they and each of them joined and assisted the union and engaged in concerted activities for the purpose of collective bargaining and other mutual aid and protection.

As in the case of the layoffs, respondent submits that the evidence shows a complete lack of any discrimination on its part in the rehiring of its employees after the strike and in its failure or refusal to rehire the employees hereinabove named. The evidence does show that of a total of 55 employees rehired between June 11 and June 24, 1937, said period being the time within which the strike was in effect, 28 were later by respondent ascertained to have been union men and 27 to be non-union men; and further, of the total of 113 employees of re-

spondent rehired during the months of June and July, 1937, 84 or 74% were later ascertained by respondent to have been union men and 29 or 26% to have been non-union men. (Respondent's Exh. No. 1, and Board's Exh. No. 5). It is equally interesting here to note that respondent likewise rehired its employees in almost exactly the same ratio as used by it in its layoffs, and furthermore that the ratio of rehiring between union and non-union men is likewise strikingly similar to the later determined ratio of all union and non-union men in its employ as of June 1, 1937.

Respondent respectfully submits that these uncontradicted figures which are a part of the record of this case do not comport and are utterly inconsistent with the idea of discrimination. It is also respectfully submitted that had respondent reemployed all of the above named union employees and rejected the application for reemployment of a like number of non-union employees, it would have been indefensibly guilty of having discriminated against its non-union employees. Instead, the evidence is consistent only with a plan of both layoffs and rehiring wherein the question of union affiliation played no part whatsoever.

It is also clear from the evidence that the reemployment of all of the complainants herein was not warranted by the condition of respondent's business and operations. The uncontradicted evidence shows that in no month since June, 1937, were there as many men employed by respondent as at the end of

May, 1937, the greatest number of men on respondent's payroll in that period being 152 in September, 1937, 13 less than the May 31st payroll. (Respondent's Exhibit No. 9)

Further with reference to the question of layoffs, we repeat that the only basis for the Examiner's finding that the layoffs were because of union activities is the MERE COINCIDENCE that the layoffs followed shortly after the first union meeting of June 1, which some of respondent's foremen attended, the unwarranted assumption of the Examiner being that since the men were present at the meeting they must have been seen by the foremen and having been seen there, and for that reason alone, they were summarily thereafter laid off. But the fact is, as disclosed by the record, that Sylvester Osborne, for instance attended the first meeting and yet he was not laid off (Tr. 116); that Chester Lucas attended the June 1 meeting, but he was not laid off (Tr. 286); that Frank German also attended the June 1 meeting and he was not laid off (Tr. 332); that Sam Dabich attended the June 1 meeting and he was not laid off (Tr. 385).

Likewise, with respect to the question of rehiring, the Trial Examiner's finding in that regard that respondent discriminated against and refused reemployment to the employees hereinbefore named because of their union activities, is also predicated merely upon the assumption that if they were in

the picket line they must have been seen there by respondent's foremen, or upon the fact that their names appeared on the list of men attached to Board's Exhibit 4. Yet it is also interesting to point out that in the case of foreman Jack Baer, he reemployed many of the men whom he had seen on the picket line (Tr. 713, 714), naming fifteen such men at random in his testimony, to-wit: Chamberlain, Chon Villa, Pete Bernard, Jr., Paul Ortega, Joe Acosta, Sam Dabich, Chris Anaya, Fierro, Frank Castillo, Pete Bernard, Sr., Jesus Rios, F. Maldonardo, Jose Arsiga, Pete Jiminez, Luis Juarez. Furthermore, although Mr. Baer made his selections on the witness stand using respondent's Exhibit 1, the names of all the men he selected, with one exception, to-wit: Frank Castillo, appear on the list of union men attached to Board's Exhibit 4.

Further, foreman Jack Baer reemployed one man, to-wit: Leland (O. L.) Fuller, when he knew that Fuller had joined the union because Fuller had told him so (Tr. 718).

Can it therefore justifiably be said or found, as by the Trial Examiner, that in the case of foreman Jack Baer his failure to reemploy Arnold Moss, Thomas A. Roddy, and Art Hannum (Tr. 715, 716) was because of THEIR union activities? Obviously, such a finding is unsupported by the evidence.

It is extremely important to note also that the evidence shows that of the four officers of the union,

two of them, namely, Luis Juarez, vice president, and Mark Damron, doorman, were reemployed by respondent, and the record shows that not only were these two officers but they were active members of the union (Tr. 110), and known to be such by respondent, they having been members of the committee which presented the petition dated June 9, 1937 (Board's Exhibit 2) to Mr. Bodine, respondent's plant superintendent on June 10, 1937 (Tr. 505).

(5) Respondent further particularly excepts to the findings appearing on page 14 of said Intermediate Report, wherein it is found:

> "I find that respondent did, on or about July 7, 1937, reinstate Sam Dabich, but did deprive him of rights and privileges previously enjoyed by him, and did reduce his rate of pay and wages and did assign him to a job other than the job which he had held prior to June 11, 1937.
>
> "I further find that respondent deprived the said Sam Dabich of rights and privileges previously enjoyed by him and reduced his rate of pay and wages, and assigned him to a job other than the job which he had held prior to June 11, 1937, for the reason that he joined and assisted the Union and engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection."

for the reason that said findings are and each of them is wholly unsupported by any substantial evidence in the record.

The evidence does show that Mr. Dabich joined the union on June 1, but it is significant to note that he was not laid off, but that he went out on strike on June 11. Unlike many of the other employees involved herein, Mr. Dabich was seen and spoken to while on the picket line by Mr. Bodine. (Tr. 389) Although the evidence does show that upon the first occasion when he asked Mr. Bodine for reemployment he was refused, he was actually given reemployment the very next day by Mr. Larson, respondent's general superintendent. (Tr. 387) Furthermore, the evidence shows that whereas he was reemployed as a brick setter in the tunnel kiln (Tr. 388) instead of in his old job greasing and oiling machinery (Tr. 384-385), he was perfectly satisfied with the change in the job that was given to him (Tr. 388), and further that Mr. Dabich knew at the time of his reemployment that his old position oiling and greasing machinery had not been filled by respondent. Mr. Dabich testified as follows:

> Q. (By Mr. Howlett) Mr. Dabich, when you went back to work did you have any convesation with Mr. Bodine as being satisfied with what job was given to you? A. No, sir.
>
> Q. Were you satisfied? A. I was.
>
> Q. Do you know who filled the job that you had before?

A. No, I don't think they got anybody on that job. (Tr. 388)

* * * * * * *

Q. So the job you were doing before has never been filled since?

A. Not that I know.

Q. You are working there now?

A. At the brick yard?

Q. Yes. (Tr. 389)

* * * * * * *

Q. What did Mr. Larson say to you?

A. Well, he told me he put me on, you go tomorow morning, so I did.

Q. Was he friendly at that time?

A. Yes, sir.

Q. And did he say anything to you about being in the picket line? A. No, sir.

Q. Did he say anything to you about being a member of the union? A. No, sir. (Tr. 390-391)

With reference to the testimony of Mr. Dabich that at the time he was reemployed Mr. Bodine told him he was starting in like a new man, we call the Board's attention to the following testimony of Mr. Bodine, which belies the idea of discrimination sought to be attached to that statement by the Trial Examiner in his findings:

Q. (By Mr. Mauritsen) Did you or did you not make a statement to Mr. Dabich that he was beginning as a new man when he applied for re-instatement?

A. I can't recall as having made such a statement. But, if I made such a statement, I would have meant by that that coming back as a new man, he would have to take the job we had open for him, and we didn't, we couldn't put him back on the job he had been on.

Q. Did you mean thereby that he lost any seniority that he might have had at the plant?

A. No; no.

Q. In other words, you, although he had gone out on strike, still regarded him as an employee of the company, did you not?

A. The same seniority as he had when he went out. (Tr. 484-485)

The attention of this Honorable Board is called particularly to the statements of Mr. Larson, general superintendent of respondent, that he is willing and has at all times been willing to take the complainants herein back to work:

Q. It has been testified here that there are a number of men that were laid off and a number of men that left the work, struck on June 11, 1937. Referring to both groups, are you willing to take those men back to work?

A. We are.

Q. Under what conditions?

A. Under the condition that they are good workers, qualified for the work they are asked to do.

Q. Do I understand you to say that you will take them back whether you have the work or not?

A. Providing we have got work for them. (Tr. 678, 679)

* * * * * * *

Q. Now, Mr. Larson, you stated that you are willing to take these men who joined the union back. Did you not? A. Yes, sir.

Q. That is you are willing at this time to take them back? A. I am.

Q. Were you willing to take these men back in June? A. Always have been willing.

Q. Were you willing to take them back in July? A. Always.

Q. Were you willing to take them back in August? A. Always.

Q. Mr. Larson, why were new men employed rather than the Union men during all this time?

A. Well, I will explain. There might be exceptions, one or two. When we needed men, suppose we needed men, we wanted to keep the machinery running and when orders came in we may have been needing ten or fifteen men to take care of eight or ten men that were sick or maybe we get a small manufacturing order to make quick; we may take some men and we haven't got time to mail postal cards or to run over the country to help the men to come back. If the men are so anxious to come back, they

ought to come to the plant and look for work, not sit around in the kitchen, because we are not going after them. (Tr. 687, 688)

III.

Exceptions to Conclusions and Recommendations.

Respondent excepts to the conclusions of the Trial Examiner, and each of them, as set forth in paragraphs 1, 2 and 3, at pages 15 and 16 of the Intermediate Report, and excepts to each and every recommendation as set forth in paragraphs 1, 2 and 3 of said Report, appearing at pages 16, 17 and 18 thereof, for the following reasons:

(1) That said conclusions and recommendations, and each of them, are and is of no force or effect, said Trial Examiner and this Honorable Board being without jurisdiction or authority to either make or enforce said conclusions and recommendations, or any of them.

(2) That said conclusions and recommendations, and each of them, are and is unwarranted by the evidence and unsupported thereby.

Respondent therefore respectfully requests that for all of the reasons hereinbefore stated, the complaint herein and all proceedings had thereon be forthwith dismissed.

Respectfully submitted,
ELLIS, HOWLETT and MacLAREN
By TOWSON T. MacLAREN
Attorneys for Respondent